

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2020

PRONOUNCED ON : 18.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.1171 of 2018

Raajendra Namalwar

Petitioner

-Vs.-

1.T. Udayakumar

1st respondent

2.Hon'ble Mrs. Justice Prabha Sridevan,
Former Judge,
Madras High Court,
No.7, Krishnaswami Avenue, Luz,
Mylapore,
Chennai - 600 004.

2nd respondent

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the impugned Award dated 10.07.2018 passed by the learned Sole Arbitrator, the 2nd respondent herein and allow the Claim Petition preferred by the petitioner as against the 1st respondent with interest and costs.

For petitioner : Mr.R.Thiagarajan

For Respondents : Mr.S. Ramesh for R1

ORDER

The case of the hand partakes the character of a "Speculative Litigation" and the narration of facts hereinbelow would clearly and succinctly demonstrate the same.

2.The claimant before the Arbitral Tribunal is the petitioner before this Court, challenging the Award passed by the Sole Arbitrator dismissing his claim. By the same Award, the counter claim filed by the respondent was also dismissed, however, there is no challenge to the same. For ease of understanding, the parties are referred to herein in the same ranking as before the Arbitral Tribunal.

3.The facts leading to the filing of the above petition under Section 34 of the Arbitration and Conciliation Act, 1996 is hereinbelow narrated:

Case of the Claimant:

4.The claimant was the owner of an extent of 2 grounds 1800 sq.ft. or thereabouts which was part of a longer extent of 5 grounds 1200 sq.ft. at D.No.29, Dr. Gurusamy Road, Chennai. The claimant was desirous of developing the said property and coming to know about the same the respondent had approached the claimant with an offer to develop the same. Trusting the respondent, he being the owner of a construction Company of considerable reputed, the claimant had entered into a Joint Venture Agreement (JVA for the sake of brevity) to develop the said property on 03.04.2006. As per the terms of the JVA, the respondent was required to allot a flat measuring 1500 sq.ft. and a pent house measuring 2500 sq.ft. with a 1000 sq.ft. open terrace in the top floor of the proposed construction. The portion to be allotted to the claimant has been described as the "C" schedule in the JVA. However, except for describing the "A" schedule none of the other schedules were described in the JVA.

5.The terms of the JVA further provided that the respondent would pay a sum of RS.70 lakhs as additional non-refundable deposit in addition to the constructed area. As per Clause 15 of the JVA, it was agreed that as per Clause 15 of the JVA till such time as the building is completed and handed over to the claimant, the respondent shall provide rent free accommodation for a period of 15 months and if there is any further delay in the completion and handing over of the constructed area, the respondent shall make payment by way of compensation for 4000 sq.ft besides 1000 sq.ft open terrace as per the prevailing market rent per month.

6.The JVA stipulated that the tenants in occupation of the property shall be evicted by the respondent at his costs, apart from meeting the expenses for preparation of plans for demolition and constructions.

7. It is the case of the claimant that the respondent had obtained building permit for constructing, a stilt and 3 floor residential building from the CMDA. The claimant would further contend that the approved

plan for the pent house and terrace was not obtained by the respondent. The claimant had engaged the services of a reputed Architect and Civil Engineer to explore the feasibility of regularizing the offending structures in the light of the building regulations. It is the case of the claimant that this expert had submitted his report dated 09.08.2013.

8.It is the further contention of the claimant that the respondent had not completed the construction of the building and was therefore liable to pay a sum of Rs.25000/- per month in lieu of the promised rent free accommodation. On the claimant coming to know that the respondent was acting to his detriment, the claimant on 31.08.2010 terminated the JVA and also cancelled the Power of Attorney given to the respondent at the time of entering into the JVA. A public notice was also issued in this regard. The claimant had also issued notices dated 27.09.2010 and 12.11.2010 under Section 138 of the Negotiable Instruments Act as the Cheque for Rs.39,99,995/- issued by the respondent dated 26.08.2010 was dishonoured. The claimant had also invoked the jurisdiction of this Court under Section 9 of the Act for obtaining interim orders and against the

dismissal of two of them appeals were also filed. The Division bench by its order dated 21.02.2012 appointed the Sole Arbitrator.

9.Though the building had been completed and allotted to various flat owners, the pent house was not handed over on or before 03.07.2007 as per the JVA. The claimant fears receiving a locking and sealing notice from the CMDA in view of the unauthorised construction. Regularization of the pent house therefore appears bleak. The claimant has therefore come forward with a claim seeking recovery of a sum of Rs.31,10,75,000/- as detailed hereinbelow:

**STATEMENT OF CLAIM REGARDING DAMAGES ARISING
OUT OF THE BREACH COMMITTED BY THE RESPONDENT**

<i>Sl.No.</i>	<i>Details of damages</i>	<i>Amount:Rs.</i>
1.	Claim towards rent free accommodation as per the Joint Development Agreement from 03.04.2006 to 02.07.2007 At Rs.25,000/- x 15 months	3,75,000.00
2.	<u>Claim towards loss of Rental Income:</u> From 03.07.2007 till date August, 2013 the promoter had to compensate for the 5000 sq.ft. of the built up area that he had completed and handed over as per the Joint Development Agreement at the	

<i>Sl.No.</i>	<i>Details of damages</i>	<i>Amount:Rs.</i>
	market rental rate of that area plus 15% increase in the rent for every two years compounded. Then prevailing rate (on market survey) varied from Rs.40 to Rs.50 per square foot. The Architect assumed a lower value of Rs.40 and worked out:	
	03.07.2007 to 02.07.2009 for 24 months = 5000x40x24	54,60,000.00
	03.07.2009 to 02.07.2011 for 24 months = 5000x52x24	62,40,000.00
	03.07.2011 to 02.07.2013 for 24 months = 5000x60x24	72,00,000.00
	03.07.2013 to 02.09.2013 for 2 months = 5000x69x2	6,90,000.00
	Total amount of compensation due	1,99,65,000.00
	Add:	3,75,000.00
	Grand Total	
	<u>Or in the alternate</u>	<u>2,03,40,000.00</u>
(iii)	Since the building has not been constructed in accordance with sanctioned plan (Pent House and Flat) and regularisation is not possible the value of the property prevailing as on date 2 Grounds and 2162 sq.ft at the rate of Rs.9 crores per ground (approximately)	26,10,75,000.00

<i>Sl.No.</i>	<i>Details of damages</i>	<i>Amount:Rs.</i>
(iv)	Damages for mental agony and expenses incurred towards litigation, Architecture Legal Fee, etc.,	5,00,00,000.00 31,10,75,000.00

Case of the respondent:

10.The respondent would contend that he had been roped in to develop the property as the claimant was unable to get any builder interested in the Joint Venture as the property was tenanted. The attempts of the claimant to evict the tenant by initiating rent control proceedings for eviction was also pending in appeal. The understanding between the claimant and the respondent was that the respondent would undertake to vacate the tenants by paying them off at his expense. The respondent also complied with this condition and had paid a sum of Rs.15 lakhs.

11.The respondent further contended that the claimant has been changing his case/pleading at every stage. From the issue of the notices dated 27.09.2010, 01.11.2010 and in the complaint under Section 138 of the Negotiable Instruments Act, filed in C.C.No.2440 of 2011 on the file

of the XIV Metropolitan Magistrate, Egmore, Chennai, the claimant had contended that under the JVA, the respondent was to provide 40% of the constructed area together with proportionate undivided share. The claimant had contended that against the terms of the Agreement to construct 10000 sq.ft. the respondent had constructed an extent of 13885 sq.ft. The claimant would contend that they are entitled to be compensated for 1554 sq.ft. which constituted their 40% in the excess extent of 3885 sq.ft.

12.As regards, the allegation of the claimant that construction was not completed within a period of 15 months from the date of JVA., the respondent would contend that 15 months would start only from the date on which the last tenant was vacated. This, in the instant case, was on 25.09.2009. Further, the adjacent owners who were none other than the mother and siblings of the claimant had not given their no objection for the demolition of the existing building. The claimant had not assisted the respondent in obtaining this NOC. The permission for demolition was obtained only on 19.09.2007. The respondent thereafter applied for

planning permission from the CMDA which was granted on 26.11.2007. The respondent had commenced construction immediately and by 08.04.2010, the flats were handed over to the 6 purchaser. The respondent would contend that the possession of the pent house had been handed over to the claimant on 11.05.2009 after its construction was completed to enable the claimant to do the interior work which was being done by the claimant's daughter, an interior designer.

13. The respondent would emphatically deny the contention of the claimant that he was unaware that the pent house was unauthorised. Despite knowing the fact that being a 30 feet road, only a stilt and 3 floors could be constructed, the claimant insisted on the construction of the pent house. Further, the claimant was being advised by an Architect, M/s.Cube Design Studio. It is in the background that the claimant had cancelled the JVA and the Power of Attorney.

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14. The respondent would further contend that the claimant had wanted his flat disposed which was also handled by the respondent who

sold the same for a sum of Rs.89,40,225/-. The above sum was paid by Cheques and a sum of Rs.20lakhs was paid by cash. Ultimately, the respondent had claimed a sum of Rs.2,66,40,651/- towards costs for evicting the tenants; amounts periodically paid to the claimant on various dates, amount paid towards purchase of extra materials for the pent house, etc.,

Rejoinder of the claimant:

15.The claimant had filed a rejoinder refuting the contentions of the respondent in the counter and contending that the very construction put up by the respondent was in violation of the provisions of the Town and Country Planning Act. The claimant would deny receipt of the sum of Rs.89,40,225/- towards the sale of his flat.

Arbitral Tribunal:

16.On 12.06.2013, the sole Arbitrator was appointed by this Court in O.S.A.No.115 of 2013. The sole Arbitrator who had reserved the matter for orders after hearing both parties passed away. Thereafter, by order

dated 27.07.2017, the learned Arbitrator who had passed the Award was appointed by order in C.M.P.No.4858 of 2017 in O.S.A.No.115 of 2013. On 10.07.2018, the learned Arbitrator has passed the Award dismissing both the claim as well as counter claim. The learned Arbitrator taking account the fact that the claim was based on false statement had also directed the claimant to pay costs of Rs.2 lakhs on the respondent. Aggrieved by this Award, the claimant is before this Court. The respondent has not chosen to challenge the dismissal of his counter claim.

Submission:

17.Mr.R.Thiagarajan, counsel appearing on behalf of the claimant would seek to set aside the Award on the ground that the Award is opposed to public policy and is a manifest miscarriage of Justice. He would contend that the respondent who was bound to obtain planning permission for putting up the pent house had not done so and further the contract had become impossible for performance as there was no possibility of obtaining permission in respect of the penthouse since it is in violation of the provisions of the Tamil Nadu Town and Country Planning

Act. The learned Arbitrator has totally erred in valuing the property at the prevailing market value and granting the said amount as compensation. He would further contend that the respondent had not even applied for planning permission for the penthouse and has therefore violated the essential term of the Contract that he shall put up construction in accordance with the law. Therefore, the dismissal of his claim is against the public policy. In support of this Argument, the learned counsel would rely on the following Judgments:

(i).AIR 2015 SC 620 [Associates Builders v. DDA]

To buttress his argument that where an Award on the face of it is violative of statutory provisions is against public interest and an Award legalizing such as action would be adversely affect the administration of justice.

(ii).2014(9) SCC 263 [ONGC v. Western GCO International Limited]

He would rely on the observation of the Hon'ble Supreme Court that

fundamental to the policy of Indian Law is the principle that the Court and also a quasi judicial authority must, while determining the rights and liabilities of the parties before it, do so in accordance with the principles of natural Justice and that the decision taken is not so irrational that no prudent or reasonable person would have arrived.

(iii).AIR 2019 SC 5041 [Ssangyong Engineering and Constructions Company Limited vs National Highways Authority of India]

In support of his arguments regarding frustration of contract the claimant has produced the Judgment but has failed to highlight the proposition enunciated therein. The other Judgments relied on by the learned counsel are as follows:-

"(i)AIR 1935 (PV) 128 [Maritime National Fish, Limited v. Ocean Trawlers Limited]

(ii).1962 AIR (Madras) 132 [Sri Amuruvi Perumal Devasthanam v. K.R.Sabapathi Pillai and another]

(iii)1969 AIR (SC) 110 [Boothalinga Agencies v. V.T.C. Poriaswami Nadar]

(iv)1998 AIR (Delhi) 365 [Eacom's Controls (India) Limited v. Bailey Controls Company and others]

(v)(2019) 5 Supreme Court Cases 725 [Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan]"

18. Per contra, Mr.S.Ramesh appearing on behalf of the respondent has only made his oral submission and has not submitted any written argument. He would submit that the claimant who was fully aware of the fact that no approval could be obtained for the construction of the pent house has directed the respondent to proceed with the same. Further, his daughter who is an interior designer is aware of the said fact. He drew the attention of the Court to Question Nos.75 and 76 and its answer during the cross examination of the claimant as CW1.

Q.75 : Since Clause 27 provides that the Agreement is subject to the approval to be granted by the Authorities, did you ask the respondent as to whether the permission had been obtained?

Ans : From the beginning the respondent was mentioning that since

it was a 30ft road + 3 floors above would be permitted and that there could be no construction for more than 10000sq.ft.

Q.76 : Is it correct to say that from the beginning you were keen about yours having the pent house?

Ans : Yes

19.The learned counsel appearing for the respondent would therefore contend that the claimant had from the very inception known that the pent house which he was keen on possessing would be an unauthorised one but would still insist on the same. That apart, the claimant was also handed over possession of the flat in November 2009 which facts has been admitted by him in answer to questionss No.130 and 131 of his cross examination. The question is as follows:

Q.130: I put it to you that the set of keys was handed over in 2008.

Ans : I deny the suggestion. The keys were handed over in November 2009.

Q.131: I put is to you that after the keys were handed over you did

not do any work inside the pent house.

Ans : I deny the suggestion. I started doing wood work inside the pent house after getting the keys in November 2009.

20. Therefore, not only had the claimant insisted on the construction of the pent house knowing fully well that the same is in violation of the Rules but he has also taken possession of the same. After having taken possession, the claimant is trying to take advantage of the fact that the construction is unauthorised to make a windfall. He would submit that the learned Arbitrator has considered the entire evidence, both oral and documentary to arrive at her award and the claimant has not made out any ground for interfering with this well reasoned award.

21. Discussion:

(i) The main ground of challenge to the Award is that the Award is against the public policy of India since the very JVA is to do an Act which is contrary to the Regulations and since it is impossible to obtain regularisation the very contract has been frustrated. The oral evidence and

the admissions of the claimant would clearly demonstrated that despite knowing the fact that no approval can be obtained for putting up the pent house, the claimant since he was keen on possessing a pent house has persuaded the respondent to put up the same. Further, not only has he persuaded the respondent to put up this construction but he has also taken possession of the same in November 2009. These facts have been totally suppressed by the claimant in his claim statement. From the records it is seen that the issue of the pent house has been taken up for the first time only before this Court in the Section 9 application i.e., O.A.No.203 of 2011. In the notices issued earlier and the complaint before the XIV Metropolitan Magistrate, Egmore, the claimant has not raised this issue. His case then was that the respondent had constructed an extra 3885 sq.ft. of which he is entitled to 40% since the agreement between him and the respondent was that he would be entitled to 40% of the constructed area. Having taken possession of the pent house and the terrace the claimant cannot now claim compensation for the same. This Court also draws adverse inference against the claimant for not proceeding further with the inspection by the Advocate Commissioner. This clearly shows that the

claimant did not want it known that the pent house had been constructed and possession taken by him.

22.In Associate Builders' case, the Hon'ble Court has held in Paragraph 33 as follows:

"It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

23.In the instant case, a plain reading of the Award would demonstrate the insistence on detail by the learned Arbitrator to the evidence on record both oral and documentary. The learned Arbitrator has weighed the same and arrived at a well reasoned Award.

24.In the Judgment in ***Ssangyong Engineering and Constructions Company Limited vs National Highways Authority of India***, where the learned Judges had referred with approval to the Judgment in ***Associate Builders***, the learned Judges has made the following observations regarding Public Policy :-

"However, when it comes to public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances, when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice."

25.The learned Judges went on to further observe as follows:

"Under no circumstances can any Court interfere with an Arbitral Award on the ground that justice has not been done in the opinion of the Court that would be an entry into the merits of the dispute, which, as we have seen, is contrary to the ethics of Section 34 of the 1996 Act, as has been noted earlier in this Judgment".

26.The learned Arbitrator taking note of this frivolous and vexatious claim made on false grounds has awarded costs of Rs.2 lakhs. The claimant has questioned this only in his written arguments in the passing stating that the Award of costs should be set aside.

27.This is a case where the claimant after taking possession of the pent house and receiving the payment for the flat sold on his behalf has filed this claim nearly four years later. The claim in question is governed

by the provisions of the Act prior to the Amendment to the 1996 Act in 2015 by Act 3 of 2016. Section 31(8) of the Act as it stood then provided as follows:

Section 31(8) in the Arbitration and Conciliation Act,

1996:

(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid. Explanation.

—For the purpose of clause (a), “costs” means reasonable costs relating to—

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.”

28.Considering the fact that the claimant has made the respondent run from one Court to another from the year 2011 on the basis of false

averments and taking into account the provisions of Section 31 (8) of the Act the learned Arbitrator cannot be faulted on awarding costs.

29. On a conspectus of the above, this Court does not find any ground warranting interference of this Court. Consequently, the Original Petition is dismissed. Before parting with the case, this Court is reminded of a quote of the Father of the Nation; Mahatma Gandhi.

"There is a sufficiency in the World for man's need not his greed".

18.05.2020

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Index : Yes/No
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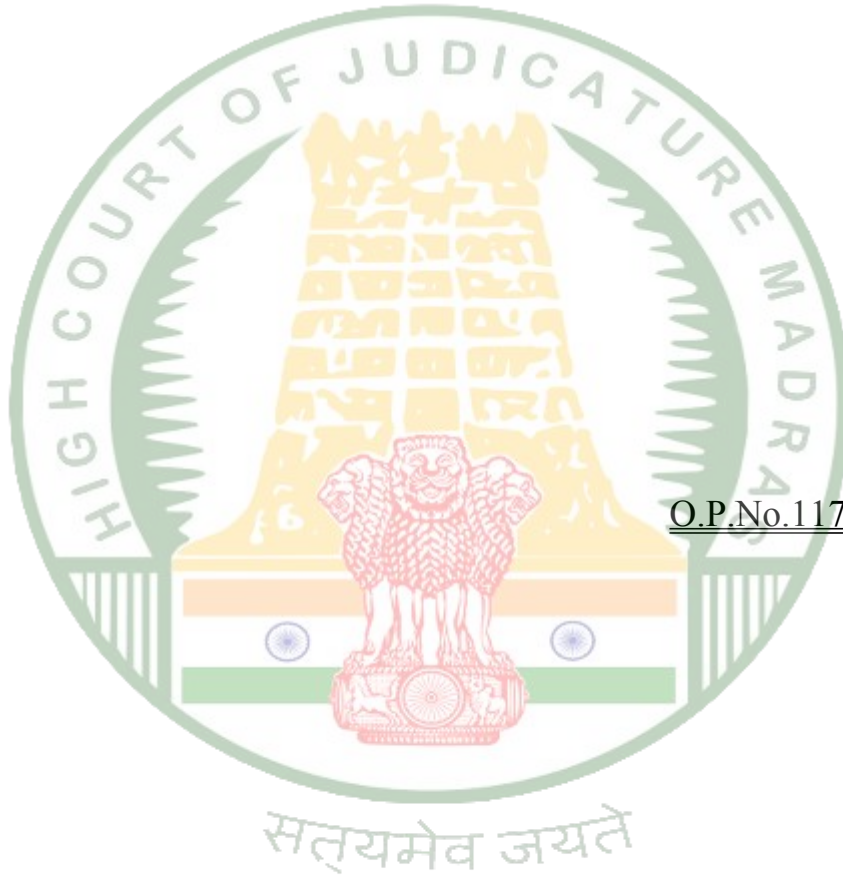
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O.P.No.1171 of 2018

P.T. ASHA. J.

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O.P.No.1171 of 2018

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18.05.2020